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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 842

H. NEIL KELLY, JR., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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TO THE HONORABLE: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit decided in the above entitled case on December 21, 1961, and in which petition for rehearing was denied on February 2, 1962.

CITATIONS TO OPINIONS BELOW

The judgment of the United States District Court for the District of Columbia is not reported but bears Criminal Case No. 1020-60. The opinion of the Court of Appeals bears No. 16324 and is not reported; petition for rehearing in the United States Court of Appeals for the District of Columbia Circuit bears the same number and the order denying is dated February 2, 1962.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on December 21, 1961 and petition for rehearing was denied in the same case on February 2, 1962. Jurisdiction of this court is invoked under Title 28 of the United States Code, Section 1254 and under Rule 19-1 of the Revised Rules of the Supreme Court of the United States. On petition for extension of time filed on the 5th day of March, 1962, an extension of time for filing a petition for certiorari was extended to and including April 4, 1962.

QUESTIONS PRESENTED

1. Does the worthless check statute for the District of Columbia, Act of July 1, 1922 [Section 22-1410 District of Columbia Code] repeal so much of the false pretenses statute, Act of March 3, 1901 [Section 22-1301, District of Columbia Code] as had previously dealt with the crime of passing checks without sufficient funds.

2. May a person be indicted under a false pretenses statute and convicted of the crime of passing a check without sufficient funds when there are two different statutes dealing with each of these specific crimes and where each statute describes a different penalty.

STATUTES INVOLVED

The statutes involved are 42 Stat. 820, Act of July 1, 1922 found at § 22-1410 of the District of Columbia Code and 31 Stat. 1326, Act of March 3, 1901 found at § 22-1301 of the District of Columbia Code. Text is set out in Appendix.

STATEMENT OF THE CASE

This case was initiated by a nine-count indictment charging fraud by wire, fraud by mail, grand larceny, and false pretenses involving two separate and distinct and rather complex factual situations. Five counts were dismissed

and the four counts of false pretenses were presented to the jury, the first involving one transaction and the remaining three a separate transaction.

Count II charged as false pretenses that the defendant petitioner caused another person to stop payment on an insufficient-funds check given for the purchase of so-called "penny" stock. (The evidence placed its value at ten cents. (J.A. 18-19; J.A. 27*); the number of shares involved was 500 for total value of $50.00). The remaining three counts charged the defendant petitioner with false personation in ordering shares of stock in the name of a person for whom he had acted previously in an agency capacity in stock transactions. (J.A. 68, 71-75) In the Opinion of the Court of Appeals for the District of Columbia Circuit, decision was based solely on Count II in affirming the conviction and consideration of the other three counts was determined unnecessary. (Opinion in Appendix) Petition for rehearing to that Court was devoted solely to Count II on which the affirmation of the United States District Court's judgment was based.

Count II involved a highly complicated stock transaction which may be best summarized as follows according to the Government's case: Defendant petitioner, using a fictitious name, opened an account with an investment house placing therein 500 shares of "ten-cent" stock. (J.A. 27-28; 107-108) Thereupon defendant petitioner through a confederate ordered through a second brokerage house 500 shares of this same stock at a price up to $8. (J.A. 26) The second brokerage house located the "ten-cent" shares, apprised itself of the true value of the shares and then purchased to their own account 500 shares at $6.25 and 2,000 shares elsewhere at ten cents. (J.A. 17-19; 14; J.A. 105-106, Gov. Ex. 4) (This latter transaction was canceled by the owner of

* References are to Joint Appendix from United States Court of Appeals for District of Columbia Circuit filed with this Court.

the company whose stock was involved (J.A. 23)) The so-called confederate of the defendant petitioner was advised by the second brokerage house that they had 500 shares for sale to him at $7 per share. (J.A. 105-106) He thereupon wrote a check to them for the 500 shares at $7 on which check he stopped payment within two days. (J.A. 110, 119; Gov. Ex. 9, 16J) It was shown that his account had insufficient funds to cover this check and that he and defendant petitioner had had checking transactions between their accounts. (J.A. 116-117, 120-121; Gov. Ex. 16A and 17B)

Throughout the trial itself, though the indictment was under the false pretenses statute, a Government bank witness, counsel for the Government and the Court itself referred to the case as a "check kiting" case. (J.A. 35-36, J.A. 98*) The Court likewise gave instruction that the case was plain and simply one of passing a check without sufficient funds.

> Now let me pass on to a consideration of the specific. Count 2, which is the first count, you will consider, charges that on or about June 1, 1959, the defendant, H. Neil Kelly, Jr., made false representations to Stanford, and by means of the false representations he obtained stock certificates from Stanford of the Commodity Holding Corporation. Specifically it is charged that, in order to obtain this stock certificate, a check for $3,500 was given to Stanford, without any intention at the time that the check would be made good, and, on the contrary, with the intention that payments would be stopped on the check, and payment was immediately stopped on it, but in the meantime Stanford had delivered the stock of the Commodity Holding Corporation to Kelly or his associate. *Now, that is the simple charge here, namely, giving a $3,500 check without intention that it should be paid and immediately stopping payment on it and in the meantime obtaining the stock certificate.*

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* Other cumulative references are found in the transcript itself: Tr. 40, 292, 413, 414, 428, 430, 462, 479-480.

So, I think perhaps I have kept my promise to you to simplify the counts of this indictment. (Emphasis added) (J.A. 97-98).

No reference was made to the local District of Columbia bad check statute, 22-1410 of the District of Columbia Code.

Original jurisdiction in the United States District Court for the District of Columbia is based on Sect. 11-306 of the D.C. Code and Sect. 3231 of Title 18 U.S.C.

REASONS FOR ALLOWANCE OF THE WRIT

1. This case involves a question which is raised for the first time in the District of Columbia although it has been there by implication for many years. See for instance, *Gilmore v. United States*, 106 U.S. App. D.C. 344, 273 F. 2d 79 (1959). It involves two Federal statutes passed to define the prosecution of two crimes within the District of Columbia, one popularly styled the False Pretenses Statute and the other the Bad Check Statute. They are found at sections 22-1301 and 22-1410 respectively of the District of Columbia Code.

The False Pretenses Statute has been on the books since 1901 with the Act of March 3, 1901, 31 Stat. 1326.[1] The Bad Check Statute on the other hand was enacted by the Act of July 1, 1922, 42 Stat. 820.[1] Historically, from the common law, false pretenses has been the generic name covering a number of crimes including the passing of bad checks. With the vast growth of negotiable transactions, however, most jurisdictions have developed separate and distinct bad check statutes especially designed to cover such transactions.

The two present statutes are a specific case in point of this evolutionary process in the false pretenses and bad check field. From the Congressional history of these two statutes it is apparent that Congress was well aware that it was changing the false pretenses law for the District of

[1] There have been subsequent amendments to the False Pretenses Statute covering the question of valuation for $35 to $100.

Columbia insofar as it concerned passing checks without sufficient funds. Just a sampling of this history points this up: 62 Cong. Rec., pages 253 and 403.

> MR. ZIHLMAN: I cannot answer that except to say that there has been great difficulty in proving the intent to defraud, and there have been few successful prosecutions under the *general law*.
>
> MR. WINGO: I am in favor of prosecutions of this sort, and I appreciate the difficultie . I have been attorney for a bank and have had cases of this kind in court, and I know the difficulties that surround them. But is not the same difficulty encountered in every case of fraud, and do you not by this simply remove the protection of the presumption of innocence from the man who defrauds by drawing a check? You raise the presumption that he is guilty when you have proved that he has no funds in the bank, and thereby shift the burden on him to prove his innocence or rather lack of intent to defraud.
>
> . . .
>
> . . . Banks are highly organized. I have been a bank director and an attorney myself. And while I support the law, it occurs to me that whenever we undertake to have reforms along this line we ought to give the benefit to *every* man who is defrauded. Why should you not make a general rule of evidence in the District that where persons obtain property or funds under false representations, and the representations are proven to be false, that that shall be prima facie evidence of intent to defraud? (p. 253) (Emphasis supplied)
>
> MR. NORRIS: . . . The Senator from Washington [Mr. Jones] is right in that respect, and yet it seems to me, upon examination of the bill which I have made since the debate has been proceeding here this morning, that it is eminently unfair and unjust, and *really is a repeal*, so far as such repeal can be made by statute passed by Congress, of the principle of the criminal law which prevails everywhere in civilized countries, that a man who is charged with a crime is presumed to be innocent until it is proven beyond a reasonable doubt that he is guilty. It seems to me that we would be justified,

if we could do so, even at this late stage, in preventing any action on the bill and letting it die a natural death.

I am not unmindful of the fact, Mr. President, that a great many of the states have statutes similar to the bill which it is now proposed to pass. In my judgment, while it is a proper argument to be adduced here, it is not conclusive of the justice of the proper legislation. In the first place, assuming that there is a law in the District of Columbia making it a criminal offense to obtain money under false pretenses—and I presume that is a fair presumption, though I am not familiar with the statute on the subject here—but all the states and all jurisdictions have statutes on the subject—assuming that to be true, *we shall run no risk whatever if the entire proposed legislation shall be defeated.* (Emphasis supplied) (p. 403)

In view of this legislative history and the continuing number of cases crossing these two statutes there is an important question of law that has not been definitely settled as to the employment of these two specific statutes to specific cases. The question is one that should be decided whether or not a false pretense statute should still govern bad check cases when a specific bad check statute has been written for the jurisdiction. It seems hardly in keeping with legislative economy that with more specific statutes the state should be less definite in applying them.

2. A second reason for allowance of this writ—which is intimately related to the first reason on a larger scale—is the presence of similar statutes and cases thereon in other jurisdictions which shows that the problem is not one peculiar to the District of Columbia.

This point was very nicely pointed up to the Court of Appeals below in footnote 30 at page 31 of an excellent brief written for the Government by Anthony G. Amsterdam of the United States Attorney's Office which note is set out here in full.

30. The pertinent state decisions are in considerable conflict. The Tennessee cases cited by appellant (Br.

15), *e.g.*, *Haley* v. *State*, 156 Tenn. 85, 299 S.W. 799 (1927), are distinguishable in that the worthless check statute there involved contains an "obtaining" element which the District of Columbia's does not. Compare also *State* v. *Marshall*, 202 Iowa 954, 211 N.W. 252 (1926), which is similar to *Haley*, and *State* v. *Richmond*, 347 Mo. 595, 148 S.W. 2d 796 (1941), construing a worthless check statute which erects no presumption of intent to defraud. *Appellee is compelled by its duty to the Court, however, to point out that in one State judicial authority does support appellant. Tartar* v. *Commonwealth*, 267 Ky. 502, 102 S.W. 2d 971 (1937). *Per contra*, other States apply their false pretense statutes to the drawing of bad checks despite the concurrent applicability of worthless check statutes, in some cases even where both statutes require "obtaining." *State* v. *Larson*, 76 Idaho 528, 286 P. 2d 646 (1955); *Lamon* v. *State*, 136 Md. 40, 109 Atl. 548 (1920) (penalty provisions of the two statutes are the same, but worthless check statute has a "purge" provision not available to the defendant under false pretense prosecution); *State* v. *Cody*, 116 Ore. 509, 241 Pac. 983, 985, 986 (1925). Although the numerical weight of state authority on the precise point seems to favor appellee, *it is appellee's view that the state precedents are so far divided as to offer no determinative guidance in the area.* (Emphasis supplied)

It might also be noted that the Government also raised as a question presented, as did the appellant below, whether the District of Columbia bad check statute impliedly repealed pro tanto the false pretenses statute. Although this question was raised by both parties below it was not even referred to in the Circuit Court's Opinion. (Appendix).

To see the seriousness of this question not only for the District of Columbia but for the states, it is only necessary to compare cases like *Haley* v. *State*, 156 Tenn. 85, 299 S.W. 799, or *Tartar* v. *Commonwealth*, referred to in the note above, to the present case. The problem of most serious concern in the differences between false pretenses and bad

check statutes has been the differing penalties. Although as the Government said in its brief below, there is conflict in the opinions, the very conflict itself indicates a need for resolution in view of the importance of these statutes in regard to present day business-related crime. Regardless of attempts to distinguish such statutes, the fact still remains that both are on the books designed essentially to correct a certain type of wrong. Not to apply them specifically has the effect of emasculating one or another of the acts and rendering the legislative design frustrated. This is especially true in jurisdictions where it has been found easier to bring the broader false pretenses indictment where the case involves a complicated check transaction.

CONCLUSION

For the foregoing reasons this case presents an important question involving two Federal statutes for the District of Columbia which requires definition and in a larger sense involves a question of conflict from State to State in regard to statutory construction where false pretenses and bad check statutes exist on the books together.

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District of Columbia Code, 1961 Edition
Title 22.—Criminal Offenses
§ 22-1301. False pretenses.

Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value, or procures the execution and delivery of any instrument of writing or conveyance of real or personal property, or the signature of any person, as maker, indorser, or guarantor, to or upon any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness and whoever fraudulently sells, barters, or disposes of any bond, bill, receipt, promissory note, draft, or check, or other evidence of indebtedness, for value, knowing the same to be worthless, or knowing the signature of the maker, indorser, or guarantor thereof to have been obtained by any false pretense, shall, if the value of the property so obtained, procured, sold, bartered, or disposed of is $100 or upward, be imprisoned not less than one year nor more than three years; or, if less than that sum, shall be fined not more than $200 or imprisoned for not more than one year, or both. Any person who obtains any lodging, food, or accommodation at an inn, boardinghouse, or lodging-house by the use of any false pretense, or who, after obtaining credit or accommodation at such an inn, boarding-house, or lodging-house, absconds or surreptitiously removes his baggage therefrom without paying for his food, accommodation, or lodging, shall be deemed guilty of misdemeanor, and upon conviction thereof in the municipal court for the District of Columbia be fined not more than $100 or imprisoned not more than six months, or both, in the discretion of said court. (Mar. 3, 1901, 31 Stat. 1326, ch. 854, § 842; June 30, 1902, 32 Stat. 535, ch. 1329; Aug. 12, 1937, 50 Stat. 628, ch. 599; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; June 29, 1953, 67 Stat. 99, ch. 159, § 215(e).)

§ 22-1410. Making, drawing, or uttering check, draft, or order with intent to defraud—Proof of intent—"Credit" defined.

Any person within the District of Columbia who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year, or be fined not more than $1,000, or both. As against the maker or drawer thereof the making, drawing, uttering, or delivering by such maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in its possession or control, shall be prima facie evidence of the intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository, provided such maker or drawer shall not have paid the holder thereof the amount due thereon, together with the amount of protest fees, if any, within five days after receiving notice in person, or writing, that such draft or order has not been paid. The word "credit", as used herein, shall be construed to mean arrangement or understanding, express or implied, with the bank or other depository for the payment of such check, draft, or order. (July 1, 1922, 42 Stat. 820, ch. 273).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16324

H. Neil Kelly, Jr., appellant

v.

United States of America, appellee

Appeal from the United States District Court
for the District of Columbia

Decided December 21, 1961

Messrs. Patrick J. Hood and *John J. Nealon*, with whom *Mr. John L. Ingoldsby, Jr.*, was on the brief, for appellant.

Mr. Anthony G. Amsterdam, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, and *Nathan J. Paulson* and *Frederick G. Smithson*, Assistant United States Attorneys, were on the brief, for appellee. *Messrs. Charles T. Duncan*, Principal Assistant United States Attorney, and *John R. Schmertz*, Assistant United States Attorney, also entered appearances for appellee.

Before Wilbur K. Miller, *Chief Judge*, and Edgerton and Fahy, *Circuit Judges*.

Per Curiam: This is an appeal from a judgment of conviction, after jury trial, on four counts of an indictment charging the defendant with false pretenses, as defined in 22 D.C. Code § 1301 (1961). Defendant, the appellant, was sentenced to a term of from one to three years on each count, the sentences, however, to run concurrently. Because of the concurrent character of the sentences the judgment should be affirmed, in the circum

stances of this case, if the conviction on any one count is free of reversible error. *Hirabayashi* v. *United States*, 320 U.S. 81; *Heinecke* v. *United States*, ——U.S. App. D.C. ——, 294 F. 2d 727, *cert. denied*, ——U.S.——.

We have considered the questions presented respecting count II, one of the four counts on which defendant was convicted. This count embraced a rather complicated stock and worthless check transaction. We are satisfied that the evidence supports the jury verdict finding defendant guilty on this count, and that the trial was free of any significant error affecting the conviction. The judgment accordingly is

Affirmed.

Filed Feb. 2, 1962
JOSEPH W. STEWART, *Clerk*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,324 September Term, 1961

H. NEIL KELLY, JR., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Before: WILBUR K. MILLER, *Chief Judge*, and EDGERTON, PRETTYMAN, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN, and BURGER, *Circuit Judges*, in Chambers.

Order

Upon consideration of appellant's petition for a rehearing en banc, it is

ORDERED by the Court that the petition for rehearing en banc be, and it is hereby, denied.

Per Curiam.

Dated: Feb. 2, 1962